A

MOHD YUSOF RAHMAT

v.

PP

B

COURT OF APPEAL, PUTRAJAYA
ZAKI TUN AZMI PCA
JAMES FOONG JCA
KN SEGARA JCA
[CRIMINAL APPEAL NO: B-09-10-2006]

C

23 JANUARY 2009

CRIMINAL PROCEDURE: *Appeal - Appeal against conviction and sentence - Rape of five-year old girl - Implication of accused to crime - Corroborative evidence - Whether sufficient - Whether prima facie case*

D *proved against accused*

EVIDENCE: *Corroboration - Rape - Whether corroborative evidence sufficient to prove charge of rape against accused - Identification of accused - Evidence of an independent nature - Prima facie case*

E

The appellant was charged with the rape of a five-year old girl between 23 December 2001 and 14 January 2002 in an upstairs room of a house in which he stayed with his family. The downstairs of the house was a kindergarten which was operated by the appellant's wife, and the victim was a student of this

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kindergarten at the time of the incident. The Sessions Court found the appellant guilty and sentenced him to 15 years' imprisonment with five strokes of the rattan. Dissatisfied with this decision, both the appellant and the prosecutor appealed against the conviction and sentence, and the inadequacy of the sentence, respectively.

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The High Court upheld the decision of the Sessions Court and dismissed both appeals, resulting in the present appeal by the appellant. The primary issue requiring consideration was whether the appellant could be implicated to the crime.

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Held (allowing the appeal, and setting aside the conviction and sentence imposed on the appellant)
Per James Foong JCA delivering the judgment of the court:

(1) The corroborative evidence in this case, on the facts, was

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insufficient to support the victim's claim that she was indeed raped by the appellant. Although she repeatedly said that the appellant had raped her, the identification of the appellant as

the person who committed the act only surfaced on two occasions. The first was when she was shown a picture of the appellant and she quickly covered her eyes with her hands, and the other was when she was shown a picture of the appellant in the dock through a TV screen during the trial conducted by a video link. There was no physical identification of the appellant nor was there an identification parade conducted soon after the arrest of the appellant, a procedure regarded as highly necessary. Without evidence of an independent nature to implicate the appellant to the crime other than what was claimed by the victim and repeated by her to various witnesses, the prosecution had failed to prove beyond reasonable doubt that it was the appellant who had raped the victim. As a *prima facie* case had not been proved against the appellant his defence should not have been called. For these reasons, the appeal should be allowed. (para 20)

Bahasa Malaysia *Translation Of Headnotes*

Perayu telah dituduh merogol seorang perempuan berumur lima tahun di antara 23 Disember 2001 dan 14 Januari 2002 di dalam sebuah bilik tingkat atas sebuah rumah di mana beliau tinggal dengan keluarganya. Tingkat bawah rumah itu ialah sebuah tadika yang dikendalikan oleh isteri perayu, dan mangsa itu merupakan pelajar tadika ini pada masa insiden itu. Mahkamah Sesyen menyabit perayu dan menghukumnya ke 15 tahun dalam penjara dengan lima pukulan rotan. Berasa tidak puashati dengan keputusan ini, kedua-dua perayu dan pendakwa merayu terhadap sabitan dan hukuman, dan hukuman yang tidak memadai, masing-masing. Mahkamah Tinggi mengesahkan keputusan Mahkamah Sesyen itu dan menolak kedua-dua rayuan, mengakibatkan rayuan ini oleh perayu. Isu utama yang perlu dipertimbangkan ialah sama ada perayu boleh dibabitkan dalam jenayah itu.

Diputuskan (membenarkan rayuan, dan mengenepikan sabitan dan hukuman yang dikenakan terhadap perayu)
Oleh James Foong HMR menyampaikan penghakiman mahkamah:

(1) Keterangan menyokong dalam kes ini, berdasarkan fakta, tidak mencukupi untuk menyokong dakwaan mangsa bahawa beliau telah dirogol oleh perayu. Walaupun beliau telah berulang kali mengatakan bahawa perayu telah merogolnya, pengecaman perayu sebagai orang yang telah melakukan perbuatan itu

A hanya bangkit pada dua ketika. Yang pertama ialah bila beliau telah ditunjuk gambar perayu dan beliau telah cepat menutup matanya dengan tangannya, dan yang satu lagi ialah bila beliau ditunjuk gambar perayu dalam kandang perbicaraan melalui sebuah skrin TV semasa pembicaraan melalui penghubungan
B video. Tidak terdapat pengecaman fizikal perayu atau pun perbarisan cam dilakukan selepas penangkapan perayu, sesuatu prosedur yang dianggap seperti seharusnya dilakukan. Tanpa keterangan yang berasingan untuk membabitkan perayu kepada kesalahan itu selain dari apa yang didakwa oleh mangsa dan
C diulangi olehnya kepada pelbagai saksi, pendakwa telah gagal membuktikan melampaui keraguan munasabah bahawa ia adalah perayu yang telah merogol mangsa. Oleh kerana sesuatu kes *prima facie* tidak dibuktikan terhadap perayu pembelaanya tidak sepatutnya dipanggil. Atas sebab-sebab ini, rayuan ini
D patut dibenarkan.

Case(s) referred to:
Aziz Muhamad Din v. PP [1997] 1 CLJ Supp 523 HC ***(ovrd)***
Balwant Singh v. PP [1960] 1 LNS 10 HC ***(refd)***
Din v. PP [1964] MLJ 300 ***(refd)***
E *Jaafar Ali v. PP [1999] 1 CLJ 410 HC* ***(refd)***
PP v. Paneerselvan Krishnan & Ors [1990] 2 CLJ 833; [1990] 2 CLJ (Rep) 804 HC ***(refd)***
Karthiyayani & Anor v. Lee Leong Sin & Anor [1974] 1 LNS 61 ***(refd)***
State of Maharashtra v. Suhkdeo Singh [1992] CRI LJ 3545 ***(refd)***

F **Legislation referred to:**
Evidence Act 1950, ss. 73A(1), (2), (7), 133A, 157

For the appellant - Mohamed Hanipa Maidin; M/s Mohamed Hanipa & Assoc
G *For the respondent - Shoba Venu Gobal DPP*

[Appeal from High Court, Shah Alam; Criminal Appeal No: 42-32-2006]

Reported by Suresh Nathan

H

JUDGMENT

James Foong JCA:

Introduction

I **[1]** The appellant is charged for raping a five year old girl between 23 December 2001 and 14 January 2002 in an upstairs room of a house which he stayed with his family. The downstairs

of this house was a kindergarten which was operated by the appellant's wife. The victim was a student of this kindergarten at the time of the incident.

[2] The discovery of the rape occurred in this manner. After Hari Raya Puasa 2001, the grandparents of the victim who had her under their charge discovered a change in the behavior of the victim. Instead of being cheerful and lively she was throwing tantrums, wetting her bed and talking in her sleep. Then one day when the victim was with her mother she complained of pain in her private parts when she urinates and upon examination of this area, her mother discovered that her vagina was red, enlarged and had an unpleasant odor. She was brought to a private clinic and the doctor who examined her confirmed that she was raped and has an infection which was sexually transmitted. A gynaecologist subsequently affirmed this finding.

[3] After some coaxing, the victim disclosed that one Ayah Su had put his "ular" into her "em-em". Following a series of consultations with a child psychiatrist (PW10), it was confirmed that "ular" to the victim meant penis and "em-em" her vagina.

[4] As the victim had informed her mother and relatives that Ayah Su was the husband of the proprietor of the kindergarten, the appellant was arrested and charged with this offence of rape.

[5] The Sessions Court which tried this case at first instance found the appellant guilty and sentenced him to 15 years imprisonment with five strokes of rottan. Dissatisfied with this decision, both the appellant and the prosecutor appealed. The appellant appealed against both conviction and sentence and the prosecutor against the inadequacy of the sentence.

[6] The High Court upheld the decision of the Sessions Court and dismissed the appeal of the appellant. The appeal by the prosecutor was dismissed.

[7] It is this decision of the High Court against him that the appellant is appealing to us.

Primary Ground Of Appeal

[8] Though the appellant's memorandum of appeal contains 38 grounds of appeal, we find that only one is material for our consideration. This relates to the implication of the appellant to the crime. As far as the factum of rape is concerned, we are

satisfied that this is proved by the evidence of the victim which is sufficiently corroborated. However, as to whether this act of rape implicates the appellant we have these to say.

[9] Firstly, s. 133A of the Evidence Act (the Act) provides:

> **Evidence of child of tender years**
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> Where, in any proceedings against any person for any offence, any child of tender years called as a witness does not in the opinion of the court understand the nature of an oath, his evidence may be received, though not given upon oath, if, in the opinion of the court, he is possessed of sufficient intelligence to justify the reception of the evidence, and understands the duty of speaking the truth; and his evidence, though not given on oath, but otherwise taken and reduced into writing in accordance with section 269 of the Criminal Procedure Code [Act 593] shall be deemed to be a deposition within the meaning of that section:
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> Provided that, where evidence admitted by virtue of this section is given on behalf of the prosecution, the accused shall not be liable to be convicted of the offence unless that evidence is corroborated by some other material evidence in support thereof implicating him.

[10] Since the victim in this case was of tender age at the time of trial, the Sessions Court held an inquiry to determine whether she could testify on oath. The decision was negative. However, it was ruled that by virtue of s. 133A of the Act, her evidence can be accepted. Further, to accommodate the victim, her evidence was recorded through video link. Under such circumstances, her evidence requires corroboration by some other material evidence to implicate the appellant to the charge as is required by the proviso of s. 133A of the Act. And the evidence found by the Sessions Court to corroborate the evidence of the victim are these:

> Walaubagaimanapun, didalam kes ini, keterangan kanak-kanak yang tidak bersumpah itu, telah disokong oleh keterangan doktor-doktor pakar, ahli keluarga dan keterangan kanak-kanak itu sendiri yang begitu meyakinkan Mahkamah bahawa kanak-kanak tersebut telah dirogol dan perogol tersebut adalah tidak lain dari Tertuduh sendiri (the child has been raped and the rapist is none other, but, the accused).

Oleh itu, tiada keraguan munasabah telah berjaya dibangkitkan oleh Tertuduh, malahan Mahkamah berpendapat bahawa pada keseluruhannya, pihak pendakwaan telah berjaya membuktikan kesnya pada tahap melepasi keraguan yang munasabah (beyond reasonable doubt).

[11] When affirming the decision of the Sessions Court, the High Court elaborated on these as follows:

1. The victim's grandfather, grandmother and aunt have testified that the victim had told them that the male person found in the kindergarten on various occasions when they were there is known as Ayah Su.

2. The evidence of the PW10, the child psychiatrist, who said that the victim has told her that it was Ayah Su who put his ular into her em-em, and on one occasion, during the counseling service, she noticed the victim was visibly upset because she said that she had seen Ayah Su. PW10 subsequently discovered that the victim had just attended a court session where the appellant was present.

3. The investigating officer (PW16) said that she was told by the victim that the person who committed the act was Ayah Su and he is the husband of the proprietor of the kindergarten.

[12] But counsel for the appellant correctly submitted to us that all these evidence emanated from the victim. In other words, the testimonies of all these witnesses are based on what was told to them by the victim. They are not independent evidence implicating the appellant to the crime. These are just a repeat of what the victim has said or described to them. As *Balwant Singh v. PP* [1960] 1 LNS 10 has declared, "a witness cannot corroborate his own testimony and that independent evidence is required to constitute corroboration".

[13] The learned Deputy Prosecutor however argued that s. 157 of the Act permits former statement made by a witness be used to corroborate the testimony of a witness. To appreciate this we reproduce s. 157 of the Act.

Former statements of witness may be proved to corroborate later testimony as to same fact

157. In order to corroborate the testimony of a witness, any former statement made by him whether written or verbal, on oath, or in ordinary conversation, relating to the same fact at or about the time when the fact took place, or before any authority legally competent to investigate the fact, may be proved.

[14] The effect of this section on the established common law notion that a person cannot corroborate himself was explained by Raja Azlan Shah FJ (as His Royal Highness then was) in *Karthiyayani & Anor v. Lee Leong Sin & Anor* [1974] 1 LNS 61:

It is settled law that a person cannot corroborate himself but it would appear that s. 157 of the Evidence Act enables a person to corroborate his testimony by his previous statement. The section adopts a contrary rule of English jurisprudence by enacting that a former statement of a witness is admissible to corroborate him, if the former statement is consistent with the evidence given by him in court. The rule is based on the assumption that consistency of utterance is a ground for belief in the witness's truthfulness, just as inconsistency is a ground for disbelieving him.

[15] The Federal Court then added that this "constitutes a very weak type of corroborative evidence as it tends to defeat the object of the rule that a person cannot corroborate himself.

[16] When the High Court confronted this same issue in *PP v. Paneerselvan Krishnan & Ors* [1990] 2 CLJ 833; [1990] 2 CLJ (Rep) 804, Edgar Joseph Jr J (as he then was) ruled that such a previous statement made by the witness is "technically" admissible but excluded it as corroboration on ground that its probative value was outweighed by its prejudicial effect".

[17] In another High Court judgment of *Aziz Muhamad Din v. PP* [1997] 1 CLJ Supp 523, Augustine Paul JC (as he then was) went even further to say that the use of such statement for the purpose of corroboration in a criminal case, just like that in a civil suit, is excluded by virtue of s. 73A(7) of the Act. This subsection declares:

For the purpose of any rule of law or practice requiring evidence to be corroborated, or regulating the manner in which uncorroborated evidence is to be treated, a statement rendered admissible as evidence by this Act shall not be treated as corroboration of evidence given by the maker of the statement.

[18] It is our judgment that the view expressed by the High Court in *Aziz Muhamad Din v. PP (supra)* on this issue of s. 157 of the Act being excluded by virtue of s. 73A(7) of the Act is erroneous. Section 73A(7) of the Act only applies to a civil case. This is explicitly stated both in the marginal note of s. 73A of the Act which says "Admissibility of documentary evidence in civil cases, etc" and in the commencement of sub-sections (1) and (2) of s. 73A of the Act which specially declare that these provisions are for those "in any civil proceedings ..." It is therefore our view that since s. 157 of the Act is not excluded from application in a criminal case by s. 73A of the Act, s. 157 remains applicable in criminal proceedings.

[19] Though such former statements by the victim in this case can be considered as corroborative evidence it is our judgment that the probative value assigned to them is far less than those of an independent nature. We must not forget that we are here dealing with the evidence of a child of tender years who is involved in an allegation of rape where even if she is an adult requires corroboration because a woman has a temptation to exaggerate an act of sexual connection, and for a child of tender years for his or her known aptitude to confuse fact with fantasy – see *Din v. PP* [1964] MLJ 300. We must distinguish between a statement that should be corroborated because of the nature of the offence eg, rape or corruption and that because the tender age of the witness. The first requires corroboration because the honesty of the witness may be questionable. These offences are easy to allege but difficult to disprove. The second because of the tender age of the witness who could be influenced by adults and his own imagination. The evaluation of evidence in each of the categories must be distinguished. Here in this instant case, we are faced with both the nature of the offence and tender age of the witness. Thus, the probative value of these corroborative evidence which were principally former statements by the victim is of little significance.

[20] Having duly considered these corroborative evidence, it is our judgment that they are insufficient to support the victim's claim that she was indeed raped by the appellant. Though she repeatedly said that Ayah Su has raped her, the identification of the appellant as the person who committed the act only surfaced on two occasions. The first was when she was shown a picture of the appellant she quickly covered her eyes with her hands. The

A other was when she was shown a picture of the appellant in the dock through a TV screen during the trial conducted by video link. There was no physical identification of the appellant nor was there an identification parade conducted soon after the arrest of the appellant, a procedure highly regarded as necessary – see
B *Jaafar Ali v. PP* [1999] 1 CLJ 410 and *State of Maharashtra v. Suhkdeo Singh* [1992] CRI LJ 3545. Without evidence of an independent nature to implicate the appellant to the crime other than what was claimed by the victim and repeated by her to various witnesses, we find that the prosecution has failed to prove
C beyond reasonable doubt that it was the appellant who raped the victim. As a *prima facie* case has not been proved against the appellant his defence should not have been called. For these reasons, we hereby allow the appeal and set aside the conviction and sentence imposed on the appellant.

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